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IN THE

Supreme Court of the United States

October Term, 1966.

No. 570.

BENJAMIN COHEN,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BENJAMIN COHEN, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 21, 1966.

OPINIONS BELOW.

The opinion of the court below (Appendix A, *infra,* pp. A1-A17) has not yet been reported.

JURISDICTION.

The judgment of the court below (Appendix B, *infra,* p. A18) was entered on July 21, 1966. A timely petition for rehearing was denied on August 24, 1966 (Appendix C, *infra,* p. A19). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether, when a co-defendant's testimony is vital to the defense in a criminal case, and such co-defendant has been severed upon his affidavit that he will not testify, the defendant on trial is required to call the severed co-defendant to the stand to claim his privilege as a prerequisite to establishing the co-defendant's testimonial unavailability.

2. Petitioner was convicted of tax evasion, the major item in question being whether he had in fact made a payment to one Rosenbaum, who had also been indicted but was severed after representing that he would not testify. Without Rosenbaum's testimony, petitioner sought to prove the fact of payment by Rosenbaum's receipt for the money and Rosenbaum's tax return that reflected the payment; the prosecution countered with evidence tending to show that Rosenbaum was impecunious, did not pay his debts, and had not paid his taxes. During the pendency of petitioner's appeal, Rosenbaum paid the tax on the precise sum petitioner had been convicted of not paying to him. A little later, by reason of the dismissal of the indictment against him, Rosenbaum became testimonially available.

The question presented is whether petitioner should be granted a new trial now that Rosenbaum has become testimonially available, or at a minimum, whether the principle of *United States v. Shotwell Mfg. Co.*, 355 U. S. 233, requires the case to be remanded to the district court for reexamination of the payment issue in the light of the subsequently occurring facts.

STATUTE INVOLVED.

Petitioner was convicted of violating § 7201, I. R. C. 1954, "Attempt to evade or defeat tax"; the text of this provision is familiar; it is not set forth here since nothing in the present petition turns on its precise terms.

STATEMENT.

Petitioner was charged in a three-count indictment R. 1284-1287) with violating § 7201, I. R. C. 1954, by willfully understating his income for the years 1960 (Count One) and 1961 (Count Two). Appellant was not named in Count Three, and he was acquitted on Count Two (R. 1316, 1317).

Count One (R. 1284-1285), which is therefore alone in question, charged petitioner with filing a false income tax return setting forth taxable income for the year 1960 in the amount of $43,941.53, instead of in the alleged true amount of $78,441.53. One, Edward G. Rosenbaum, was named in Count One as an aider and abettor.

In due course, on motions made at different times by petitioner, by Rosenbaum, and by the prosecution, petitioner and Rosenbaum were severed (R. 8, 9, 11). Rosenbaum's affidavit filed in the district court in support of his own motion for severance stated "2. That after conferring with his counsel he does not intend to take the stand in the event of a trial on said charges."[1] (Petitioner's Pet. for rehearing filed in court below, p. 11).

1. Nine copies of petitioner's petition for rehearing have been filed with the Clerk of this Court.

The asserted difference in petitioner's taxable income for 1960 as set forth in Count One, $34,500, was arrived at as follows:

Petitioner received $60,000 in cash from one, Sam Eig, a real estate operator of Silver Spring, Maryland, as part of a brokerage commission for obtaining from the Teamsters' Union Pension Fund financing for Eig's motel projects. The asserted difference of $34,500 was made up of sums that petitioner contended were the actual shares paid to his joint venturers in the brokerage arrangement, Rosenbaum and one, Charles S. Tobin, shares that the prosecution charged were not paid by petitioner to these two in 1960.

The most closely contested issue at the trial, which consumed 14 full days, at which 61 witnesses testified, 144 exhibits were received, and a transcript aggregating 2871 pages was compiled (R. 1300), was whether petitioner had paid Rosenbaum $30,000.

Such payment was evidenced by Rosenbaum's receipt, dated March 8, 1960 (Govt. Ex. 185, R. 1479), and by Rosenbaum's own tax return for the year 1960, which reported receipt of the $30,000 (Govt. Ex. 3, R. 1436, especially at 1438).

Rosenbaum being a severed defendant, he was not called by either party; the trial judge's memorandum recites (R. 1312) that "neither side was in a position to call as a witness the severed defendant, Rosenbaum * * *".[2] The prosecution accordingly sought to prove, by a species of reverse net worth, that he could not have received the $30,000. Evidence was introduced to

2. Not until the opinion filed by the court below was there any intimation that petitioner was required to call Rosenbaum to the stand and force him to claim his privilege as a prerequisite to proving his availability.

show that Rosenbaum had not paid the tax due on the $30,000 received from petitioner (R. 680), and that he owed substantial Federal taxes for previous years (R. 681-682) in the amount of $35,000, a sum that had been outstanding since 1951 (R. 869), and that although assessments had been made, the balance due had never been collected (R. 870-873). It was shown that Rosenbaum's tax liability had been in excess of $400,000, but that no payments had been made in 1960 on the balance due (R. 874).

Other witnesses testified to Rosenbaum's non-payment of certain hospital, medical and dental bills (R. 781 *et seq.;* R. 804-818), to his failure to contribute to litigation costs in regard to an estate when his interest therein was attached by the Government (R. 819, 824-833); and to the repayment by his sister of a loan made to him (R. 836-845). Another of Rosenbaum's sisters testified that she made small loans to him that he repaid (R. 846-849, 853-855). One witness told of loans made to Rosenbaum on the basis of friendship as to which repayment was not sought (R. 862-864). Tobin, one of the joint venturers, testified that late in 1960 or early 1961, when Rosenbaum was going into the hospital for surgery and sought to borrow $1,000, he asked petitioner for his suggestion, and that petitioner advised him not to lend money to Rosenbaum because the latter borrowed money from everyone and was a deadbeat (R. 391-393).

Jury trial having been waived, the trial judge at the close of all the evidence found petitioner guilty on Count One (R. 1299, 1302, 1317), finding specifically that Rosenbaum did not receive $30,000 or any substantial portion thereof during the year 1960 (R. 1313-1315).

Another though less sharply contested issue during the trial was whether petitioner paid to his coventurer Tobin $10,000 of the sum received from Eig. Tobin signed a receipt evidencing payment of the $10,000 on March 8, 1960 (Govt. Ex. 7, R. 1441; Def. Ex. 44, R. 1481), and this payment was reflected in Tobin's 1960 income tax return (R. 383-387; Def. Ex. 41, not printed).

Subsequently, following an investigation into petitioner's affairs (R. 393, 433, 460, 463), Tobin told the F. B. I. and a Federal Grand Jury that he had received $5500 from petitioner in 1960, that the balance of $4500 was paid in 1961, and that then the receipt had been back-dated; and Tobin so testified at the trial (R. 385, 387-388, 471-473, 485-486). Also subsequently, and at the suggestion of internal revenue agents, Tobin filed amended tax returns on the basis of having received the $10,000 over two years rather than one, and obtained a refund accordingly (R. 461, 462, 475-476, 486-488; Def. Ex. 41, not printed). On this issue also, the trial judge made special findings adverse to petitioner (R. 1309-1310).

On the whole issue of liability under Count One, which, the judge said, "must be determined by the credibility of the witnesses" (R. 1315), he made findings of credibility adverse to petitioner's testimonial contentions at the trial (R. 1315-1316). But the judge simultaneously found petitioner Not Guilty on Count Two (R. 1316, 1317).

Following the filing of a timely notice of appeal (R. 1360), and before that appeal was argued in the court below, Rosenbaum in fact paid all of his 1960 taxes, the last payment having been made early in January 1966; this fact was admitted by Government counsel in the court below during argument.

Earlier, when a Government witness testified at the trial, on November 25, 1965, Rosenbaum had a tax liability outstanding (R. 859, 875-876). The record shows that the Internal Revenue Service abated over $178,000 of Rosenbaum's taxes in 1948 (R. 1250), but it is a fact that the Service never abated any of his 1960 taxes under § 6404, I. R. C. 1954.

Rosenbaum was scheduled to go on trial in his own case on January 4, 1966. Prior to that date, he had paid part of his 1960 taxes, and his counsel so advised the district court at a pretrial hearing on December 30, 1965. Following the pretrial hearing and before the actual date of his trial (and doubtless in anticipation of that trial), Rosenbaum paid all of his 1960 Federal income tax then due. Moreover, for the year 1965, Rosenbaum reported earnings of $28,000 derived from "finders' fees," the precise kind of income involved for the year 1960.[3] (Petitioner's Reply Br. filed in court below, pp. 13-14)

As we have said, Government counsel at the argument below conceded the making of these payments.

More than that, Rosenbaum was not in fact put on trial on January 4, 1966, as planned, but, to the contrary, the indictment against him was dismissed on February 26, 1966.

None the less, the court below affirmed. It made no mention in its opinion of the fact, admitted at the bar of its court, that Rosenbaum had paid and the Government had retained the tax on $30,000 received from petitioner in 1960.

In respect of Rosenbaum's testimony, the court made no mention of the trial judge's statement (R.

3. Nine copies of petitioner's reply brief have been filed with the Clerk of this Court.

1312) that neither side was in a position to call him; instead the court below said (*infra*, p. A16):

> "The defense could have called Rosenbaum. The choice not to do so was no doubt the product of the careful strategy of the outstandingly able counsel who represented Cohen. * * * we think the whole matter dissolves when it is remembered that had Rosenbaum been called he could immediately have invoked his constitutional privilege against self-incrimination regardless of whether he was or was not under indictment. At any rate, the defense could not preserve the point, if there is one, by simply assuming unavailability."

REASONS FOR GRANTING THE WRIT.

Petitioner, a lawyer who has been over 38 years at the Bar (R. 984), was prosecuted and stands convicted and sentenced to imprisonment and marked for professional destruction for the crime of having in effect represented in his tax return that he paid $30,000 to Rosenbaum, while, simultaneously, the same Government that prosecuted him has been paid and retains and has never abated the tax due from Rosenbaum on the footing that he in fact received this precise $30,000 from petitioner.

Surely, a result so unconscionable calls for a better answer, and one more consonant with justice, than that given below. We submit that the present posture of the case stems directly from the disregard of important and controlling principles of law by the court below, and that review by this Court is accordingly required.

First. We argued below that the United States could not properly prosecute an individual for acts in respect of which it simultaneously deprives him of his defense against such a prosecution, in this instance depriving him of Rosenbaum's testimony by causing Rosenbaum to be indicted as a co-defendant, by analogy to the principle that a judgment of conviction cannot stand where the prosecution has withheld evidence from the defense, whether deliberately as in *Brady v. Maryland,* 373 U. S. 83, or negligently as in *United States v. Consolidated Laundries Corp.,* 291 F. 2d 563 (C. A. 2); and particularly by analogy to the decisions where the Government in a criminal case asserted a privilege in documents that the accused needed in order to defend against the accusation made. In that

situation, the Second Circuit held that the Government must choose between giving up the privilege and giving up the prosecution; it cannot prosecute for matters connected with materials that it refuses to disclose; it will not be permitted to prosecute one of its citizens while simultaneously, by asserting privilege in respect of relevant matter, it impairs his ability to defend. *United States v. Andolschek,* 142 F. 2d 503; *United States v. Grayson,* 166 F. 2d 863. It was these decisions and this precise line of reasoning that led, first to *Jencks v. United States,* 353 U. S. 657, 670-672, and then to the Jencks Act, 18 U. S. C. § 3500. Significantly, a conviction cannot stand if Jencks Act documents have been deliberately destroyed before trial. *United States v. Lonardo,* 350 F. 2d 523 (C. A. 6).

The foregoing argument, premised on Rosenbaum's unavailability at the trial, has now been rendered moot by the circumstance that the indictment against him has, since that trial and before the argument below, been dismissed; this was done on February 26, 1966; so that, either in the event of a new trial in this case, or even only of a further hearing, Rosenbaum will be available as a witness.

But the court below held that Rosenbaum had not been shown to be unavailable because he was not called to the stand to claim his privilege, a ruling that runs counter to all authority.

1. Since Rosenbaum in his affidavit supporting his motion for severance had said he would not testify, calling him to the stand simply to require him to reassert his privilege would have been a vain act—and, certainly up to now, the law has not insisted on the performance of useless acts. *Tacey v. Irwin,* 18 Wall. 549, 551; *Sims v. Everhardt,* 102 U. S. 300, 310.

2. Every other Circuit considering the point has uniformly held that it is a prejudicial error in respect of a defendant on trial to require either an accused or a witness known to intend to claim his privilege to make that claim of privilege from the stand. *United States v. Housing Foundation of America,* 176 F. 2d 665 (C. A. 3); *Fletcher v. United States,* 332 F. 2d 724 (D. C. Cir.); *United States v. Echeles,* 352 F. 2d 892 (C. A. 7). As the Third Circuit said in the case first cited (176 F. 2d at 666), "the plain difference between the privilege of witness and accused is that the latter may not be required to take the stand at all." And in the present case, certainly, where Rosenbaum was simultaneously a co-defendant and a key witness who had declared on oath his considered refusal to testify, calling him would not have constituted the "few lapses" that were considered in *Namet v. United States,* 373 U. S. 179, and there held not significant.

3. Wigmore is in accord: 8 *Evidence* § 2268 (3d ed., 1940, p. 396; McNaughton rev., 1961, p. 410):

> "3. *Codefendant.* For a *codefendant* in a *criminal case,* the privilege of course applies—i.e., one defendant cannot call a codefendant unless the latter waives his privilege."

4. We emphasize the words, "cannot call." Accordingly, the trial judge was plainly right in ruling (R. 1312) that "neither side was in a position to call as a witness the severed defendant, Rosenbaum * * *."

It follows that the case must be considered on that footing, and that the court below committed both error and injustice by characterizing Rosenbaum's non-appearance as simply an instance of astute or even tricky trial tactics.

Second. Deprived of the testimony of Rosenbaum, the other party to the contested transaction, petitioner did the best he could with what he had: He took the stand himself to testify to the fact of payment (R. 990, 992, 1057). This testimony was corroborated by Rosenbaum's receipt[4] for the $30,000 (Govt. Ex. 185, R. 1479) and by Rosenbaum's tax return that reflected the $30,000 as income (Govt. Ex. 3, R. 1436, 1438).

The prosecution countered with net worth in reverse; it endeavored to show that because Rosenbaum did not pay his taxes, did not pay other bills, borrowed without repayment, and was said to have been characterized by petitioner as a deadbeat, it necessarily followed that he could not have received $30,000 from petitioner, a Q. E. D. that impressed the trier of facts (R. 1315).

We think that this conclusion did not follow, that the trial judge's reliance on the foregoing evidence was not justified, and that the use of such evidence was not only erroneous but prejudicial, for two reasons.

One, the basis of straight net worth is that an increase of assets can only result from income, inheritance, or gift; even so, this Court has recognized that the net worth method "is so fraught with danger for the innocent that the courts must closely scrutinize its use," and that the "pitfalls inherent in the method * * * require the exercise of great care and restraint." *Holland v. United States,* 348 U. S. 121, 125, 129.

Two, not only were no safeguards used here, but the reverse net worth method rests on the fallacious

4. Of course the receipt was back-dated since no receipt was given at the time of the payment of money.

assumption that every recipient of money uses it either to pay his debts or to improve his level of living. We say fallacious, because that assumption ignores too many volitional and subjective variables to permit drawing the ultimate inference that the trial court here drew, namely, the conclusion that Rosenbaum's "penury" was proof that he could not have received the money for which he receipted and which he returned as income. After all, many persons with means at hand fail to pay their debts. See *United States v. Palermo,* 259 F. 2d 872 (C. A. 3); *Atwood v. Scott,* 99 Mass. 177.

Since the time that the present case was tried, however, better, stronger, and more cogent evidence bearing on its central issue has become available. Rosenbaum's indictment has been dismissed, so that he is now compellable as a witness. And Rosenbaum has paid the tax due on the $30,000 that petitioner said he gave him—in respect to the asserted non-payment of which petitioner now faces jail. More than that, the same Government that is about to incarcerate petitioner for not making the payment is keeping and has never abated the tax that Rosenbaum paid on the footing that he received this identical payment.

We submit that the present posture of the matter is so thoroughly unconscionable that, in the interests of the fair administration of justice, petitioner must be granted a new trial, at which the foregoing facts and all of their surrounding circumstances can—and should—be thoroughly and painstakingly explored. Cf. *Delbridge v. United States,* 262 F. 2d 710 (D. C. Cir.); *Benecke v. United States,* 356 F. 2d 439, 441 (C. A. 5).

Third. We have not overlooked the trial judge's adverse finding in respect of the other questioned pay-

ment, to Tobin. But that was a lesser issue, and in the outcome was obviously influenced and indeed overshadowed by the contest over and the resolution of the issue arising out of the questioned payment to Rosenbaum. It is simply unrealistic to suggest that the trial judge would have found petitioner guilty on Count One if he had also found that petitioner in fact had paid the $30,000 to Rosenbaum, the latter a conclusion now susceptible of far stronger support because of Rosenbaum's later tax payment and his current testimonial availability.

Fourth. Of course "It is more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding." *Bartone v. United States,* 375 U. S. 52, 54. For that reason we think a new trial is indicated here. But, at a minimum, the case should be remanded to the district court under the principle of *Shotwell Mfg. Co. v. United States,* 355 U. S. 233, for reconsideration of its finding of nonpayment in the light of the additional matters not available to it at the time of the original trial: The fact that Rosenbaum has now actually paid the tax on the $30,000 that petitioner was convicted of not giving him, and the fact that the Government has never undertaken to abate Rosenbaum's tax liability in respect of that $30,000, and, preeminently, the fact that Rosenbaum, no longer under indictment, is now compellable to testify.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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